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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
| | ) | |
| Multi-Association Group (MAG) Plan For Regulation Of Interstate Services Of Non-Price Cap Incumbent Local Exchange Carriers And Interexchange Carriers | ) | CC Docket No. 00-256 |

## COMMENTS

The United States Telecom Association ("USTA") submits its comments in response to the *Further Notice of Proposed Rulemaking* ("*Further Notice*") in the above-captioned proceedings.[1] USTA has participated in the earlier deliberations of the Rural Task Force ("RTF") Recommendation before the Federal-State Joint Board on Universal Service and the Commission.

## I. Introduction

The Commission sought comments on the need for preventing excessive growth in universal service support for high cost, rural and insular areas served by rural carriers during the five years of the concurrently-adopted interim support plan.[2] The Commission also sought alternative proposals. During the relatively short period of the interim rural support plan, the

[1] Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, FCC 01-157, released May 3, 2001 ("*Further Notice*").

[2] *Id.* at ¶¶ 207-211.

threat of excessive fund growth owing to the "capture" of ILEC customers by competitive eligible telecommunications carriers' ("CETCs'") captured lines is, as the Commission recognized, speculative. Consequently, the Commission can fulfill its short term responsibilities to prevent interstate customers from shouldering too high a support burden by monitoring universal service fund growth due to CETC qualification for per-line support and by ensuring rigorous and effective enforcement of the statutory mandate that support must be used only for its intended universal service purposes. It should refrain from adopting a remedial freeze for a problem that may not materialize under the interim plan.

Monitoring will show if uncapped CETC support growth burdens the support system inappropriately. Existing flaws and gaps in the Commission's policies for CETC support may result in uneconomic incentives to seek ETC designations. Changes may become necessary to deal with the problem of excessive growth in uncapped support for CETCs, not only from the impact of line "capture" on portable per-line support, but also from support for pre-existing and "new" lines, should one or more additional designated CETCs draw per-line support in the same area. USTA urges the Commission to deal directly with the problem of excessive funding for CETCs at interstate ratepayers' expense by changing policies that distort market entry incentives. If the Commission finds that CETC support is growing too fast, it must cautiously develop limitations for CETC funding that will not jeopardize ILECs' ability to carry out the carrier of last resort responsibilities imposed upon incumbents.

## II. The Commission should carefully monitor fund growth for support to CETCs, ensure enforcement of Section 254(e), and refrain from adopting a freeze on support when a competitor enters a rural carrier's area.

There is no current need for action to control the growth of CETC support, especially via a freeze that would further cramp the already-capped support for incumbent universal service providers. The Commission itself relied on persuasive arguments for not adopting RTF proposal to freeze support in rural study areas where a CETC initiates service.[3] Its reasons are equally applicable to the current issue. The Commission recognized that the possibility of excessive fund growth, which was identified as the potential harm against which the RTF recommendation was directed, was speculative.[4] Given the purpose of the additional freeze proposed by the RTF and rejected by the Commission, the Commission stated that the potential excessive fund growth addressed by the freeze would occur when a CETC captures lines from an ILEC, that the threshold level is unclear, and that the likelihood of reaching such a level during the next five years is unknown.[5] The Commission also acknowledged that the indexed cap on the high cost loop fund for ILECs will operate as a check on excessive fund growth.[6]

The Commission expressed concern about imposing "complex and administratively burdensome regulations" if it adopted a freeze.[7] Specifically, the Commission cited the need to adopt a new reporting requirement on rural carriers to implement the proposal that frozen per-line support would be calculated on cost and line count data for the 12 months prior to the quarter in which a CETC initiates service. The Commission also recognized that rural carriers would have to continue to file annual cost data. In order to carry out such a requirement, the Commission said it would have to adopt additional reporting requirements and/or procedures for state certification, as well as some procedure to verify that the need for increased support was due to a catastrophic event.

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[3] *Further Notice* at ¶¶ 123-131.

[4] *Id.* at ¶ 126.

[5] *Id.*

[6] *Id.*

[7] *Id.* at ¶ 127.

The Commission expressed its greatest concern over the fact that a freeze "may have the unintended consequences of discouraging investment in rural infrastructure…."[8] In support of its concern, the Commission cited numerous comments from carriers stating that their ability to obtain necessary support for investing in rural plant would be hampered by a freeze of loop support. The concern for such constraints on beneficial investment remains valid and will not dissipate over the next several years. Before the Commission takes steps that would have such an adverse effect, it should further study the situation and gain experience with actual competition and support payments to CETCs, since it should base any contemplated action regarding a potential freeze of support on clear evidence that there is a problem and that a proposed solution actually remedies the identified support growth problem. The costs of adopting a freeze at this time continue to "significantly outweigh" the potential benefits.[9]

During this time, the Commission should assure itself that states are applying and effectively enforcing the provisions of Section 254(e) of the Communications Act of 1934, as amended, (the "Act")[10] with respect to carriers whose support is not based on their own costs. That provision requires that CETCs use universal service support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[11] As discussed below, the costs of ILECs and CETCs will almost certainly vary and, to the extent that a CETC receives loop support based on different, higher ILEC costs, then the CETC receives funds that exceed its own universal service costs, in violation of Section 254(e). Any

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[8] *Id.* at ¶ 129.

[9] *See Id.* at ¶ 130.

[10] 47 U.S.C. § 254(e).

[11] *Id.*

overpayments will require proper attention and adequate enforcement, but the current circumstances do not require a freeze at this time.

## III. If a CETC is designated in a rural ILEC's area, its support should be based on its own costs and should receive support only for lines that it captures or adds following its designation.

Should the Commission observe excessive fund growth in its monitoring as CETCs proliferate, it should adopt a solution tailored to the observed problem, rather than impose an additional freeze on ILECs' support. A cap would inappropriately deprive ILECs and their customers of support for actual universal service and carrier of last resort costs they have already incurred, solely to provide CETCs with a level of support for which no need has been shown.

In the *Further Notice*, the Commission expressed concern regarding potential excessive growth of the high-cost loop fund. The Commission accurately noted that support for CETCs is not covered by the fund's cap on support to ILECs.[12] However, the Commission did not recognize that its rules create an opportunity for CETCs to take advantage of regulatory arbitrage. The rules provide the possibility of granting ILEC-based per line support to competitive entrants in excess of their costs, providing them with the incentive and ability for inefficient competitive entry.

There is no basis upon which to presume that CETCs and ILECs have the same costs or that providing identical support will provide each the "sufficient," but not excessive, support required by Section 254 (b)(5) of the Act. Section 254 also provides that federal universal service support mechanisms should be "specific"[13] and "predictable."[14] The Commission has stressed that CETC support must be identical to ILECs support, rather than "specific" to the

[12] *Further Notice* at ¶¶ 207, 209.

[13] 47 U.S.C. S 254 (b)(5) and (c).

[14] 47 U.S.C. § 254(b)(5).

CETC's circumstances, in the name of its principle of "competitive neutrality." However, ILECs and CLECs are not similarly situated. Only the CETC can choose whether to provide service and under what rates and terms, based on its own costs and the available per-line support based on costs which each ILEC has already incurred. Since many ETCs utilize wireless technology, it would be an unusual coincidence for a CETC to need federal loop, switching and Long Term Support payments based on the costs of ILEC facilities and functions for the "provision, maintenance, and upgrading of facilities and services." In addition, when a carrier that has been successfully providing service in a rural ILEC's area at market-based rates gains CETC status, the carrier draws support for all of its existing lines, rather than new or captured lines gained with the aid of federal support. While it is theoretically possible that a competitive carrier could have higher per-line support customer costs than an incumbent, it is doubtful that such a competitor would choose to enter a market under those conditions. Thus, simple marketplace dynamics will prevent carriers with higher costs than the incumbent from entering such territories, thereby preventing excessive fund growth as a result of this circumstance.

In summary, the Commission should address any excessive funding caused by CETC entry that it detects by basing CETCs' support on their own costs, instead of providing them with the same support, based on rural ILECs' costs, necessary for incumbents to sustain service meeting the higher standards imposed on them as carriers of last resort. Limiting CETCs' per-line support to CETCs' per line costs would be more consistent with the Commission's goals of competitive neutrality, encouraging investment in rural infrastructure and promoting efficient competitive entry,[15] while also complying with Section 254(e) of the Act.

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[15] *Id.*¶ 210.

## IV. Conclusion

USTA urge that the Commission continue to monitor CETC support growth, that the states effectively enforce the Section 254(e) restriction on the use of support payments with respect to carriers whose support is not based on own costs, that the Commission refrain from adopting a further freeze on ILECs' support to curb excessive support growth for CETCs, and that the Commission take further appropriate action to control the growth of CETC support only if its monitoring detects excessive growth in CETC support.

Respectfully submitted,

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July 30, 2001

## CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on July 30, 2001, Comments of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the attached service list.

Meena Joshi